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FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FCC 93M-445
31934

In re Applications of)

SCRIPPS HOWARD BROADCASTING COMPANY)

For Renewal of License of Station WMAR-TV
Baltimore, Maryland)

and)

FOUR JACKS BROADCASTING, INC.)

For a Construction Permit for a New
Television Facility on Channel 2
at Baltimore, Maryland)

DISPATCHED BY

File No. BRCT-910603KX

File No. BPCT-910903KE

MEMORANDUM OPINION AND ORDER

Issued: July 06, 1993

; Released: July 08, 1993

Background

1. This is a ruling on a Petition To Enlarge Issues Against Scripps Howard Broadcasting Company that was filed on May 13, 1993, by Four Jacks Broadcasting, Inc. ("Four Jacks"). An Opposition was filed on May 26, 1993, by Scripps Howard Broadcasting Company ("Scripps Howard"). An Opposition also was filed by the Mass Media Bureau (the "Bureau") on May 26, 1993. A Reply was filed by Four Jacks on June 8, 1993.

2. Four Jacks seeks issues which have a core allegation that a subsidiary of Scripps Howard had engaged in anticompetitive and discriminatory conduct in the Sacramento cable market as evidenced by certain jury verdicts in a federal district court civil action. Four Jacks had sought to have the issue certified to the Commission for a determination outside of this proceeding. That relief, which was opposed by Scripps Howard and by the Bureau, was denied by the Presiding Judge in an earlier ruling. See Memorandum Opinion and Order, FCC 93M-303, released May 26, 1993.¹ Four Jacks seeks a similar issue for alleged antitrust misconduct in the Glasgow, Kentucky market. Four Jacks seeks to add related disclosure issues. Four Jacks also seeks issues added on whether Scripps Howard has abused the Commission's process by attempting to impede the prosecution of applications filed by Four Jacks, and on whether Scripps Howard has engaged in discriminatory employment practices in its Memphis, Tennessee TV station.

¹ See also Order FCC 93M-362, released June 15, 1993, (related ruling denying a Motion For Correction that was filed by Scripps Howard on June 2, 1993).

FactsAlleged Anticompetitive Conduct

3. Sacramento Cable Television, a general partnership organized under California law ("SCT") and a Scripps Howard subsidiary, had succeeded in receiving a local cable permit in the Sacramento market in 1984. There was an ensuing lawsuit commenced by the losing party in which special jury verdicts found that there was a scheme by the municipalities to defend municipal action on a theory of "natural monopoly." The facts and the findings are set forth in the court's Memorandum Decision, Conclusions Of Law and Order For Judgment in the case of Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322, 1338, 1349-50 (E.D.Cal. 1987). It was found as a fact by the jury that a "sham natural monopoly" was used by municipal defendants to obtain from SCT "cash payments, in kind services, and increased campaign contributions." *Id.* at 1338, 1349-50. The court ultimately issued an injunction against the municipality defendants. There was no Scripps Howard entity that was a party to the action.

4. This is not the first time that the Sacramento misdeeds have been brought to the attention of the Commission. The Bureau noted that SCT's allegedly unlawful acts and practices were the subject of a ruling by Bureau letter dated November 27, 1987, from the Chief, Video Services Division who found that the verdicts were not final adjudications. Similar letters were issued on March 4, 1988, and on February 22, 1991 concerning the same allegations. In the latter letter, the Chief, Television Branch stated that the Commission staff had "fully considered the matters---and conclude[d] that there are no substantial questions of fact that would warrant any further inquiry." Finally, on July 27, 1992, the Bureau sent a letter that stated there were no findings made as to the impact of the Sacramento lawsuit on Station WMAR-TV and those allegations would be resolved in the context of the WMAR-TV proceeding. Thus, it is found that the Commission had knowledge of the facts and circumstances surrounding the Sacramento proceeding yet concluded that there was no ground to set an issue for hearing to determine further facts and to decide whether there was a violation of the Act and the Commission's rules.²

5. Four Jacks also alleges that Scripps Howard has engaged in anticompetitive practices with respect to the operation of a cable franchise in Glasgow, Kentucky. Another Scripps Howard subsidiary, Telescripps Cable

² That conclusion was reached with knowledge of matters that went beyond the special verdicts of the jury. For example, Four Jacks refers to a documented understanding that was reached between Sacramento and SCT whereby the city received \$15 million and SCT was permitted to engage in discriminatory pricing for its services in the franchise area. It is alleged that SCT actually offered basic services in areas where there was a competitor at a predatory price of .25 (25 cents) per month. Multiple lawsuits were filed against the Scripps Howard subsidiary for alleged anticompetitive practices including a class action that challenges the charging by the affiliate of non-uniform rates in competitive and in non-competitive areas.

Company ("Telescripps"), was engaged in litigation with a municipal entity that was in competition with Telescripps for cable subscribers. Discriminatory pricing was in issue. The parties settled their differences out of court.

6. The Bureau opposes the addition of an issue because of the disposition of the dispute by settlement which negates any reportable judgment of anticompetitive practices. Scripps Howard argues that it was not a party to the Sacramento litigation which ended in a settlement and therefore the verdicts cannot be applied as adjudications against Scripps Howard. And since there was no adjudication against Scripps Howard as a party there was no duty to disclose the Sacramento litigation. Scripps Howard asserts that there were no adjudicated findings arising out of the Glasgow litigation, which concluded by settlement, and no character issue can be added based on the Glasgow allegations of anticompetitive conduct.

Alleged Racially Discriminatory Course Of Conduct

7. A TV station owned by Scripps Howard in Memphis, Tennessee was sued by an African- American news anchor for acts of alleged racial discrimination that occurred in 1977-1981. A United States District Court found after a trial on the merits that Scripps Howard had discriminated in the denial of a promotion, in the failure to furnish a written contract, in salary payments, and by retaliation for asserting his civil rights in a lawsuit. Lowery v. WMC-TV, 658 F. Supp. 1240 (W.D.Tenn.1987). The trial judge found the practices to be "pervasive, continuing, invidious and on-going." Id. at 1244. The employer took an appeal to a federal Circuit Court of Appeals and, while the appeal was pending, there was a settlement. In accordance with the settlement, the District Court decision was vacated. The Bureau argues that there is no showing of a pattern of discrimination, and no nexus shown between the Memphis situation and the operation of the Baltimore station, particularly where the Memphis activities took place more than ten years ago. Scripps Howard relies on the vacation of the Memphis discrimination judgment and, in any event, asserts that the Commission has already considered the Memphis circumstances in connection with Scripps Howard's renewal of its Memphis broadcast station.

Alleged Abuse Of Commission Processes

8. Four Jacks alleges that Scripps Howard has attempted to impede its efforts to apply for the Baltimore station that is at issue here, as well as other Four Jacks' applications. The record reflects that Four Jacks filed a mutually exclusive application for Channel 2 in Baltimore on September 3, 1991. Also, during that same month, Four Jacks filed assignment applications with respect to certain of their broadcast interests. Scripps Howard filed applications for reconsideration of these "routine" Form 316 applications. The conclusion of abusive pleadings is sought by inference from circumstances of Scripps Howard having no right to challenge the pro forma applications, the failure on the part of Scripps Howard to establish any standing to challenge the applications, and the fact that there was no change of ownership being sought by the transfers to subsidiary corporations. The Commission staff denied the petitions to deny that were filed by Scripps Howard. The Bureau

states that Scripps Howard was technically correct in alleging that the Form 316 applications were incomplete. The Bureau urges that the Scripps Howard pleadings raised legitimate questions even though the legal arguments advanced did not result in any rescission of the transactions. See letter dated April 16, 1992 from Chief, Video Services Division (Exh. 16 to Four Jack's Petition).

9. Four Jacks asserts another count of abusive use of a Commission process through acts taken to oppose a tower proposal. Four Jacks asserts that it would use a "top mount" to a tower owned by Cunningham Communications, Inc., ("Cunningham") a corporation owned by Four Jacks. The antenna for a TV station owned by Four Jacks, WBFF-TV, was previously located atop the Cunningham tower at an FAA approved height of 381 meters AMSL. The WBFF-TV antenna was later moved to a new site. Four Jacks proposed to use the same space on the Cunningham tower to construct a tower for Station WMAR-TV. The Four Jacks site proposal was filed on September 3, 1991. On December 5, 1991, the licensee of Baltimore radio Station WPOC(FM), which leases space on the Cunningham tower, filed a CP application to lower the authorized height for any antenna on the tower to 368.5 meters.³ There was no authority obtained or sought from Cunningham or Four Jacks to seek permission to lower the tower height. And one month later, January 28, 1992, Scripps Howard filed a petition to deny the Four Jacks application because of the lower tower height. Four Jacks seeks to tie Scripps Howard to Nationwide's efforts through notations on Nationwide's correspondence that copies were sent to counsel for Scripps Howard. Scripps Howard also directly intervened with a letter in opposition to the Cunningham correspondence concerning the WPOC application.

10. Four Jacks further alleges facts to show that Scripps Howard has interfered with relationships between the Cunningham tower owner and its tenants and between the owner and the local government. One tenant was allegedly misrepresented to Cunningham as opining that the tower could not support an antenna for WMAR-TV. The tenant later wrote to Scripps Howard to correct that misapprehension. Scripps Howard also commissioned an engineering study of the tower proposal which resulted in a negative report that was used in an effort to have the tower declared structurally unsafe by the local county authorities. The same report was used to support the Scripps Howard petition to deny and to seek an added issue. There was no determination made by the county that the Cunningham tower was unsafe. The Commission denied the Scripps Howard petition to deny. The petition to add an issue is under consideration by the Presiding Judge. The Bureau makes no comment with respect to the alleged collusive activity between Scripps Howard and

³ WPOC(FM) is owned by Nationwide Communications, Inc. ("Nationwide") which is not a subsidiary of Scripps Howard. Four Jacks does not show any direct relationship between Scripps Howard and Nationwide. There is a footnote reference to a former president of Scripps Howard as being Nationwide's president which had sought to purchase WPOC. But there is no further connection shown with Scripps Howard by linkage of ownership or control.

Nationwide concerning efforts to lower the authorized tower height. There is no direct evidence proffered to show a collusion.

11. Scripps Howard admits that it filed a petition for reconsideration of short-form assignments for three TV stations owned by Four Jacks and for the assignment of associated private microwave licenses. The oppositions were based on an uncontested fact of a missing exhibit, were filed in accord with Commission rules, and were based on a viable theory.⁴ Scripps Howard also asserts that it has done nothing improper to delay the assignments. Scripps Howard asserts that it was inquiring about the views of a tower tenant only after it had obtained an engineering study so that there was a reasonable basis for making the inquiry. Scripps Howard relies on the professionalism of the engineering firm that conducted the study to conclude that the Cunningham tower was overloaded and structurally unsound. Scripps Howard relies on its Constitutional right to petition local government regarding matters that deal with public safety.

12. The Bureau supports Scripps Howard's right to make inquiry into Four Jacks' antenna site citing as one reason that the Cunningham tower height, as recorded in the Commission's data base, was incorrect ever since Four Jacks' top mounted TV antenna was removed. The Bureau notes that the Hearing Designation Order, 8 F.C.C. Rcd 2326 (MM Bur. 1993), identified the tower height as only 368.5 meters due to the removal of the Channel 45 antenna in 1987. The Bureau specified an air hazard issue because it was not clear that the proposed height of 381 meters had been authorized.⁵ The Bureau finds no fault with efforts by Scripps Howard to correct the data base, or to raise questions with county officials about the tower's safety based on an expert's report. The Bureau finds no actionable wrong with Scripps Howard's alleged instigation of Nationwide to correct the tower height.

Discussion

13. The facts alleged by Four Jacks are considered under the Commission's current policy standards. As a basic principle, an issue will not be added unless there are facts alleged which raise a substantial question of fact concerning an applicant's qualifications. Washoe Shoshone Broadcasting, 5 F.C.C. Rcd 5561, 5562 (Comm'n 1990). Here there are two types of issues that are sought: First, there are the derivative issues that arise

⁴ Scripps Howard had a theory that there would be control over programming and business operations retained by the assignor. All three assignment applications had the same provision. Apparently, the Bureau was not convinced of the substantive merits of the evidence.

⁵ The air hazard issue set in the HDO was resolved in Four Jacks' favor in the Presiding Judge's summary decision. See Memorandum Opinion And Order, FCC 93M-315, released June 1, 1993.

out of court litigation which can be disqualifying.⁶ Second, there are conduct issues which are based on reliable evidence presented by a party. See 47 C.F.R. §1.229(d) (there must be specific allegations of fact sufficient to support the action requested).

14. The first two issues sought are of the derivative type and seek an inquiry as to whether adjudicated findings of anticompetitive and racially discriminatory conduct reflect adversely on Scripps Howard's qualifications as a Commission licensee. The Commission has adopted the following policy:

[F]or the purposes of a character determination, consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction,---.

Character Qualifications, 102 F.C.C.2d 1179, 1202 (1986). (Emphasis added.) See also Policy Regarding Character Qualifications, 1 F.C.C.Rcd 421, 422 (1986) (Comm'n to consider adjudicated violations of the antitrust laws that are broadcast related). The Sacramento litigation and the Glasgow litigation meet that criteria. However, there are other qualifiers. The adjudication must be final and the adjudication (civil) must not be a consent decree. See 102 F.C.C.2d at 1205 n.62 and n.64. The Sacramento litigation was final in that there was no appeal taken from the jury verdicts. The Glasgow litigation was resolved by settlement. In that case, a federal court dismissed an antitrust claim against Scripps Howard because of a lack of subject matter jurisdiction. The Glasgow litigation is too uncertain to be the subject of a character issue. Therefore, only the Sacramento litigation can be considered as an adjudication that could qualify for an added issue.

15. Scripps Howard has cited case authority holding that it is a deprivation of due process to make Scripps Howard accountable for findings in a litigated case to which it was not a party and in which it did not participate. See Martin v. Wilks, 490 U.S.755, 762 (1989).⁷ If the issue had been resolved against Scripps Howard on a non-litigated petition to deny,

⁶ The Commission has focused on three types of adjudicated misconduct: (1) fraudulent statements to the government; (2) certain criminal convictions; and (3) violations of broadcast related anticompetitive and antitrust statutes. Character Qualifications, 102 FCC 2d 1179, 1195 (1986).

⁷ The Court qualified its holding. A non-party may be bound if its interests are adequately represented by someone with the same interests who is a party. Id. at n.2. The Sacramento municipality defendants would have the same general interest as a Scripps Howard subsidiary to have the franchise award declared valid and to avoid liability for alleged unlawful activities committed in concert with each other. But the case was a private action brought by a competitor for a cable franchise that had been awarded to SCT. The municipality had an interest in having a viable franchise to operate a cable system. But it could be any one of several competitors. Also, the action sought injunctive relief that was unique to the municipality or franchise grantor. Therefore, the interests of the municipality and the interests of Scripps Howard [SCT] are not identical.

there would have been a stronger argument of a lack of due process. But in this renewal hearing Scripps Howard would be heard to explain its conduct and possibly to mitigate any adverse consequences. The question is whether the Commission intended a litigated issue under the facts of the Sacramento litigation. The non-party status of Scripps Howard [SCT] to the Sacramento litigation precludes application of collateral estoppel on facts and the scope of discovery and hearing of evidence would therefore be considerable.⁸

16. The Commission's renewal application form specifically requires disclosure of reportable non-FCC litigation which involve a final adjudication of broadcast related antitrust violations. The Form 303 instruction provides:

the fact that neither the licensee nor its principals are named as defendants in suits involving their non- broadcast associations cannot govern disclosure. Our concern is with the conduct underlying the litigation and the participation of the licensee's principals in such behavior.

Revision of Form 303, 59 F.C.C. 2d 750, 762 (1976). In a clarification ruling, the Commission stated its policy to require disclosure of antitrust violations "only upon a finding of guilt or the entry of a judgment or decree adverse to the renewal applicant or its principals." In re Revision of Form 303, 61 F.C.C. 2d 27, 30 (1976). There is no mention of requiring a party status to the relevant litigation. See also Character Qualifications, *supra*, 102 F.C.C.2d at 1205 (the question is whether the conduct is finally adjudicated). The Bureau has consistently taken the position that Scripps Howard was not required to disclose the antitrust litigation because there was no final judgment in any lawsuit to which Scripps Howard was a party. In reliance on those rulings, Scripps Howard did not disclose on Form 303. But there was considerable disclosure of the facts in the several petitions to deny that were filed by PacWest. Under the circumstances there was no intentional act of nondisclosure and no Section 1.65 issue will be added.

17. In a series of letters responding to petitions to deny renewals of other Scripps Howard licenses and the assignment of Station WMAR-TV, the Bureau concluded that there were no substantial and material questions of fact raised by the Sacramento litigation and that there had been no adjudication that would qualify for a character issue. The Bureau stated in July 1992:

⁸ Among the unlawful Sacramento activities, Four Jacks alleges the conduct of a group of seventy three local business persons who were organized by SCT as the "Gang of 73" to lobby city and county officials. That proof raises a potentially complex Noerr-Pennington defense, i.e., whether the group was formed to engage in a bona fide attempt to influence governmental action and therefore exempt from the antitrust laws. Such an issue could be fact intensive. See Clipper Express v. Rocky Mountain Motor Tariff, 674 F.2d 1252, 1264 (9th Cir. 1982) which held: "Whether something is a genuine effort to influence governmental action or, a mere sham, is a question of fact."

The Petition to Deny challenges the basic character qualifications of the licensee, but our review of those allegations finds no substantial and material question of fact as to whether grant of the KUPL/KUPL-FM [Oregon] renewal applications would be in the public interest. [Citations omitted.]

To the extent that PacWest's Petition to Deny Sacramento in this proceeding cross-references allegations made in its Petition for Reconsideration of Scripps Howard's acquisition of Station WMAR-TV, Baltimore, we also find that those matters do not adversely impact the grant of the KUPL/KUPL-FM renewal applications. However, we make no finding as to the impact of those allegations on Station WMAR-TV. Those allegations will be resolved in the context of the WMAR-TV proceeding.

The Bureau has taken the position that the "proceeding" did not refer to this renewal proceeding. Instead, it referred to the assignment proceeding in February 1991 wherein the Bureau had determined in an acceptance of a withdrawal of a petition to deny that "there are no substantial and material questions of fact that would warrant any further inquiry." In light of the positions already taken by the Bureau, the request by Four Jacks for certification to the Commission to determine whether an issue had been erroneously omitted from this proceeding was denied by the Presiding Judge. Memorandum Opinion and Order, FCC 93M-303, released May 26, 1993.

18. The Bureau continues to oppose the addition of a Sacramento litigation issue because Scripps Howard was not a party to the Sacramento litigation. The Presiding Judge agrees that there should be no issue added. Since the Sacramento case went to a jury and there was a judgment entered from which an appeal might be taken there was an "adjudication." But Scripps Howard could not appeal the judgment. And thus the findings of the jury would become final as to Scripps Howard without its right to take an appeal. The Commission's policy is to condition any Commission action on character determinations on consideration of the issues which are the subject of an appeal. Character Qualifications, *supra* at 1205 n. 63. There may have been an appeal taken by Scripps Howard if it were a party to the Sacramento litigation or, at least Scripps Howard would have had a right of appeal. Scripps Howard should not be forced to now defend itself in the context of a trial record not of its making and in which it never participated and from which it could never appeal.

19. The Commission declared as a further standard for adding issues of antitrust adjudication only where "a relatively focused inquiry of non-FCC misconduct will be considered---as bearing on misconduct." *Id.* at 1208. Since Scripps Howard was not a party and would not be collaterally estopped on the facts,⁹ it is concluded that the inquiry as to its participation in the actions of the municipality would probably not be a "focused inquiry."

⁹ See RKO General, Inc., 82 FCC 2d 291, 312-13 (Comm'n 1980) (for collateral estoppel to apply the issues must have been litigated by the parties).

20. There is a lack of specificity in the pleadings which makes any assessment of the scope of the proceeding with such an added issue difficult to ascertain, i.e. Scripps Howard's corporate structure vis a vis SCT, the partnership that received the cable franchise in Sacramento. Nor are the common principals/employees of SCT and the Scripps Howard counterparts at WMAR-TV described for attribution purposes. Where there is a parent/subsidiary relationship, the Commission "will focus on the actual involvement of the common principals in both the misconduct and in the day to day activities of the broadcast subsidiary." Character Qualifications, supra at 1218-19. At a minimum, Scripps Howard would be afforded the opportunity to retry evidence of its alleged active misdeeds in connection with the underlying evidence considered by the jury. Then attributable persons will need to be tied to the acts:

Adjudications of individual acts occurring at a subsidiary will require showing of the involvement of the relevant individual in the activities of the broadcast subsidiary, and the existence of an attributable interest in the broadcast subsidiary.

Character Qualifications, supra at 1220. The Commission expects that such showings be made with specificity before a case is expanded to such length by adding an issue. See 47 C.F.R §1.229 (d). Four Jacks' motion has been found lacking in such specificity. The Commission will not permit issues to be added out of curiosity. Priscilla L. Schwier, 4 FCC Rcd 2659, 2660 (Comm'n 1989).

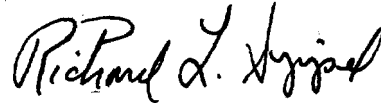
21. The other issues also are rejected for a lack of specificity. The discriminatory employment practices in Memphis took place in 1977-81. See Lowery v. WMC-TV, 658 F. Supp. 1240, 1243, 1265 (W.D. Tenn. 1987). There is no connection shown between the management at WMC-TV (Memphis) during that time period and the management at WMAR-TV (Baltimore). There is also remoteness of time and remoteness of geographic locality that project no more than a remote chance that such activities would occur in Baltimore in 1993 or thereafter. The allegations with respect to abuses of the Commission processes are speculative and conjectural and therefore shall not be added. Priscilla L. Schwier, supra. The petitions to deny were all in proper form according to the Bureau. The questions raised about Four Jacks' tower site were based on an engineer's report which lends credibility to the bona fides of the questions raised.¹⁰ And as noted by the Bureau, the tower data in the Bureau's data base was inaccurate which justified the furnishing of corrective data by Scripps Howard. The Bureau also is correct in its assessment of the questions of safety raised by Scripps Howard with local officials who would be concerned about the safety of an antenna's structure.

¹⁰ The substantive merits of Scripps Howard's criticisms of the tower site and the reasonable assurance of a viable site are to be addressed in a ruling on a motion to add a site issue against Four Jacks which is now under consideration.

Ruling

Accordingly, for the foregoing reasons, IT IS ORDERED that the Petition To Enlarge Issues Against Scripps Howard Broadcasting Company that was filed on May 13, 1993, by Four Jacks Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel
Administrative Law Judge